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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

156.81 ACRES OF LAND, MORE OR LESS, SITUATE IN COUNTY OF MARIN, STATE OF CALIFORNIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED*

Whether interest in an action for condemnation pursuant to 40 U.S.C. 257 runs from the date the award is paid and the government obtains possession and title to the land, whether or not the land is improved.

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*Additional defendants below were: Frank W. Lynch, Ellenora C. Lynch, Edward R. Fitzsimmons, Elizabeth S. Fitzsimmons, Karl Melchers, Karen W. Melchers Stackhouse and Helene Goode Stackhouse.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 671 F.2d 336. The opinions of the district court (App. C and D, *infra*, 15a-19a) are unreported.

The judgment of the court of appeals was entered on March 12, 1982, and rehearing was denied on June 1, 1982 (App. B, *infra*, 13a-14a). On August

18, 1982, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

40 U.S.C. 257 provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

40 U.S.C. 258a provides in pertinent part:

> In any proceeding in any court of the United States * * * for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States.
>
> * * * * *
>
> Upon the filing said declaration of taking and of the deposit in the court, to the use of the per-

sons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

STATEMENT

1. Two types of condemnation are provided for by statute: under the Declaration of Taking Act, 40 U.S.C. 258a, the government may obtain title and possession immediately by filing a declaration of taking and depositing with the court the estimated amount of just compensation. If the judicially determined amount of just compensation is greater than the amount deposited, the government must pay the difference with interest from the date the declaration of taking is filed; no interest is due on the amount originally deposited. The alternative condemnation method, "straight condemnation," is initiated by filing a complaint in condemnation pursuant to 40 U.S.C. 257. The government makes no deposit with the court, and the landowner retains possession and title until the judicial proceedings have been completed and the government has paid the judgment awarded.

This case raises the question of when interest begins to accrue in a straight condemnation case.

2. On July 12, 1976, the United States filed a complaint pursuant to 40 U.S.C. 257 to condemn property located in Marin County, California, for inclusion in the Golden Gate National Recreation Area.[1] Beginning on June 20, 1977, a jury trial was held to determine the amount of just compensation to be paid for the interest condemned by the United States. On July 14, 1977, the jury reached a verdict of $3,799,400. On November 9, 1977, final judgment was entered in favor of the landowners in that amount.

On November 17, 1977, the United States moved for a new trial, or, in the alternative, for remittitur, followed by extensive briefing by the parties. The motion was denied by the district court on June 20, 1978, and, on August 11, 1978, the United States filed a notice of appeal; the landowners then cross-appealed. By stipulation of all parties, the appeals were withdrawn on October 30, 1978.

On November 17, 1978, the Assistant United States Attorney deposited the full amount of the award with the clerk of the court in satisfaction of the judgment. Ten days later, the government deposited an additional $239,802.90, representing interest at the rate of 6% on the judgment for the year between the entry of final judgment and the payment of that judgment. Distribution of the additional deposit was made subject to a further order of the court. On March 5, 1979, the United States filed

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[1] The Act of Oct. 27, 1972, Pub. L. No. 92-589, 86 Stat. 1299, 16 U.S.C. 460bb *et seq.*, established the Golden Gate National Recreation Area and authorized acquisition of lands within its boundaries by the Secretary of the Interior.

a motion for an order to disallow interest on the judgment.

3. On June 21, 1979, the district court granted the government's motion and issued an order disallowing interest on the judgment (App. C, *infra*, 15a-17a). Relying on the established principle that "interest is allowable only from the time of the 'taking' to the date of the payment of the award," see, e.g., *Danforth* v. *United States*, 308 U.S. 271 (1939), the court found that the United States had not exercised "control and dominion" over the land prior to payment of the judgment (App. C, *infra*, 17a). In its order denying the landowners' motion for reconsideration, the court found no support in the record for the landowners' claim that "the land had increased in value during the time that elapsed from the entry [of verdict] until the Government's taking" (App. D, *infra*, 19a).

4. The United States Court of Appeals for the Ninth Circuit reversed, Judge Wallace dissenting. The court held that interest running from the judgment date should be allowed. Recognizing that "[w]here the property is income-producing, the condemnation judgment is not a taking" (App. A, *infra*, 7a), the court distinguished this situation, where the land was undeveloped, and hence producing no current economic benefits for the owners. In that situation, the court reasoned, the existence of the judgment in condemnation produced a "cloud on the title" that precluded the development or sale of the land, and thus "denied the landowners any economically viable use of their land" (App. A, *infra*, 8a). Accordingly, the panel majority concluded that the date of taking of undeveloped land is the date of judgment, mandating the award of post-judgment interest (*ibid.*).

Judge Wallace dissented, relying on "the long-standing rule that absent a taking by physical possession or by statutory provision, no taking occurs until payment of the condemnation award." App. A, *infra*, 9a. He could see no reason for drawing a constitutional distinction between the owner of unimproved and improved property in these circumstances; both are in the same situation as owners whose ability to sell or develop their land is thwarted by publicly announced government plans to condemn property (App. A, *infra*, 11a). All alike suffer economic burdens that are significantly less than "the kinds of substantial deprivations which have heretofore been recognized as constitutional 'takings'" (App. A, *infra*, 11a-12a). Judge Wallace concluded that any change in the rules applicable to unimproved property should "come from Congress rather than the federal courts" (App. A, *infra*, 12a).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring[2] question concerning the government's obligation to

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[2] The courts that have recently considered the issue have selected various points in the straight condemnation process for the beginning of the accrual of interest. The issue is currently pending in the Court of Appeals for the Fifth Circuit. *United States* v. *2,175.86 Acres of Land in Hardin and Jefferson Counties, Texas, & Kirby Forest Industries*, 5th Circuit No. 81-2402. The district court in *Kirby Forest Industries*, 520 F. Supp. 75 (E.D. Tex. 1981), awarded interest from the date the complaint was filed, some seven months before trial. See also *United States* v. *59.29 Acres of Land in Hardin County, Texas*, 495 F. Supp. 212 (E.D. Tex. 1980) (interest due from the date of the filing of the report and findings of the Commission appointed pursuant to Fed. R. Civ. P. 71A to determine just compensation); *United States* v. *Cer-*

pay interest in straight condemnation cases. The court of appeals' resolution of that question is inconsistent with this Court's decision in *Danforth* v. *United States*, 308 U.S. 271 (1939), and its more recent just compensation cases. In addition, it will be difficult for condemnation courts to apply, and will substantially increase condemnation costs while unfairly discriminating between owners of developed and undeveloped land. A landowner suffering injustices as a result of delays in the payment of a straight condemnation award has alternative remedies free from these disadvantages.

1. Although the potential financial impact on the government of the decision below cannot be predicted with any accuracy, it is bound to be large. As of September 1982, pending cases filed under 40 U.S.C. 257 involve more than 6,000 tracts of land, valued by the government at more than $100 million. The landowners' valuations are, of course, much higher. Most of these condemnations are for the use of the Park Service, and thus presumably involve unimproved land. Assuming that only half of the land involved is determined to be non-income producing, and that there is on the average only 6 months of interest awarded and only at 6% straight interest, the total extra interest obligation under the analysis of the court below would still be about one and a half million dollars for currently pending cases alone. The

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tain Lands in Eastham, Truro, and Wellfleet, County of Barnstable, Commonwealth of Massachusetts, Nos. 68-208C *et al.* (D. Mass. May 28, 1982) (same); *United States* v. *15.65 Acres of Land in the County of Marin, State of California*, Nos. 81-4062 & 81-4101 (9th Cir. May 25, 1982, rehearing denied, Sept. 10, 1982) (interest due from stipulated date of valuation, more than a year before trial).

actual figure would doubtless be substantially in excess of that estimate.

Congressional appropriations to finance these condemnations have been based on the long-standing assumption, recognized by the dissent below (App. A, *infra*, 9a), that in straight condemnation cases where the government has not entered into possession, the date of taking is the date that the government pays the condemnation award,[3] so that no interest is due. In carving out an exception to this general rule for non-income producing land, the court below imposed an unanticipated increase in the cost of acquiring such land, thereby reducing the agencies' abilities to implement congressional directives.

2. In *Danforth* v. *United States*, *supra*, 308 U.S. at 284, this Court concluded that "[u]nless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view that the taking in a condemnation suit * * * takes place upon the payment of the money award by the condemnor. No interest is due upon the award." (Footnote omitted). In concluding that there has "in actuality" been a previous taking when unimproved lands are involved,[4] the court below overlooked the

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[3] Cf. S. Rep. No. 1597, 90th Cong., 2d Sess. 5 (1968), directing the Park Service to utilize straight condemnation proceedings to preserve the option to reconsider, after judgment award fixes cost of acquisition. The option is important: "[t]he cost of public projects is a relevant element * * *, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost," *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 554 (1946).

[4] If the government were to enter into possession of the land before the payment of just compensation, that would effectuate a taking "in actuality", which would require that

analysis upon which the *Danforth* conclusion was based:

> The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. (Footnotes omitted.) *Ibid.*

The argument adopted by the court below that the land was taken when the condemnation judgment denied the landowners "any economically viable use" of their property (App. A, *infra*, 6a) is the same as the claim of the *Danforth* landowner that the government "took" a flowage easement in his farmland[5] either when Congress passed the Flood Control Act that authorized the condemnation or when the government built levees as part of the project, because these actions had, as a practical matter, reduced his ability to use or sell his land. This Court rejected that claim, holding that this reduction in the value of the land, like other changes in value that are incidents of ownership, "cannot be considered as a 'taking' in the constitutional sense" (308 U.S. at 285). There is no suggestion that the size of the change in

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interest be paid to compensate the landowner for the delay in payment. *United States* v. *Dow*, 357 U.S. 17, 24 (1958). In the instant case, however, the district court specifically found that the government had not exercised control and dominion over the land until after it deposited the amount of the verdict in the registry of the court (App. C, *infra*, 17a).

[5] See Brief for William H. Danforth, Petitioner, No. 309, 1959 Term at 4.

value, or a complete inability to sell the land, would have affected the Court's reasoning.[6]

This Court has recently reiterated the teaching of *Danforth*, in again rejecting the claim that the pendency of condemnation proceedings constitutes a constitutional taking of property. *Agins* v. *City of Tiburon*, 447 U.S. 255, 263 n.9. ("Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, * * * cannot be considered as a 'taking' in the constitutional sense"). Cf. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (no taking where statute forbids sale of property).

3. The court of appeals' distinction between "vacant, unimproved land" and income-producing land (App. A, *infra*, 6a-7a) does not withstand analysis. First, vacant, unimproved land may be income producing, for instance if it is used for grazing or timbering (See, e.g., *Kirby Forest Industries*, *supra*, where the district court, using an analysis like that of the court below, concluded that a timber lot was unimproved, and thus not income producing). And, of course, improved land may be difficult, or even impossible, to rent or to use at a profit for all or part of the time the condemnation suit is pending. It is not clear how the court of appeals would treat such situations.[7] Perhaps more seriously, the distinc-

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[6] Indeed, the Court quoted (308 U.S. at 285, n.20) the reference in *Brown* v. *United States*, 263 U.S. 78, 85-86 (1923) to "the presumption * * * that the valuation included the practical damage arising from the *inability* to sell or lease after the blight of the summons to condemn [emphasis added]."

[7] The same classification problem arises if the land is largely unproductive, but has a few improvements that do produce

tion assumes that unimproved land is necessarily held for speculative purposes, while improved land is not. But improved land may well be held with the intention of upgrading its use, and unimproved land may be held without any intention of deriving any present economic benefit from it. As the dissent below recognized (App. A, *infra*, 9a-12a), there is no reason why only the speculative interests of unimproved landowners merit protection.[8]

The difficulty is not resolved by requiring the court to evaluate the particular motivations of all owners of condemned land, whether income producing or not. A major advantage of the fair market value standard of valuation is to avoid requiring the condemnation court to consider such particular values of the individual tract to the landowner. See, e.g., 1 L. Orgel, *Valuation Under the Law of Eminent Domain*, §§ 14, 74-76 (2d ed. 1953).

4. Fairness does not require the award of interest to the landowner who remains in possession for the period between the entry of judgment and the vesting of title on the payment of that judgment. In *Dan-*

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some income. See, e.g., *United States* v. *Holden*, 268 F. Cas. 223, 224 (N.D.N.Y. 1920) (large tract of land; "for the most part it is a swamp and unproductive", but contains two buildings rented for $25 a month).

[8] Indeed, to the extent that interest is designed to compensate the landowner for the loss of the use of the property between the date of the taking and the payment of the award, the owner of non-productive land—who had no current income from the land before the taking, and thus lost nothing that he previously enjoyed—has a less worthy claim to interest than an owner of income producing property whose ability to continue to gain a return on his land is diminished by the pendency of the proceeding. Cf. *United States* v. *Holden*, *supra*, 268 F. Cas. at 224.

forth, supra, this Court recognized the justice of permitting the government a reasonable time to decide whether to acquire the property, once its cost has been established. See also *Tiburon, supra*, 447 U.S. at 263, n.9.[9] If that decision is unreasonably delayed, the landowner may move for dismissal pursuant to Fed. R. Civ. P. 71A(i)(3). In the absence of such a motion, it is reasonable to assume that the landowner does not object to the delay in the payment of the judgment, because he prefers to retain possession of his land, for economic or non-economic reasons.

If the landowner does move for dismissal, he is free at the hearing on the motion to present adequate evidence of any increase in value of the property in the interim in order to demonstrate the inequity of permitting the government to recover on the stale judgment. Cf. *United States* v. *Clarke*, 445 U.S. 253, 258 (1980).

Where, as here, no such evidence has been presented by the landowner[10] the district court correctly refused to assume that the land had increased in value (App. D, *infra*, 16a-17a).[11] Accord, *Gould* v. *United States*, 301 F.2d 557, 560 (D.C. Cir. 1962). In this situation, it is surely reasonable to treat the

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[9] If the government abandons the proceedings, it generally becomes liable to pay the condemnee reasonable attorneys' fees and other litigation expenses. (42 U.S.C. 4654(a)(2)).

[10] The landowner bears the burden of proving the value of the land. *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 273 (1943).

[11] Indeed, as the district court noted (App. C, *infra*, 17a), the record evidence indicating "the uniqueness of this land and the particular problems that its development would entail" made reliance on any general escalation in real estate prices particularly inappropriate here.

condemnation transaction like the usual commercial transaction—when payment is received at the time that title and possession of the goods are transferred, no interest is due.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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